The three options are:

First, under the amnesty option, licensees may forfeit *all* of their licenses and their downpayments. In return, the Commission will (in coordination with the Department of Justice) approve forgiveness of their outstanding debt and cancellation of the additional penalties, including a deficiency payment (representing the difference between the net bid price and the price obtained in a subsequent auction), that otherwise would be due. The licenses will then be reauctioned.

Second, under the disaggregation option, licensees may return half of their spectrum in a given market or markets in exchange for a corresponding reduction of debt. This is consistent with our existing disaggregation rules, facilitates new spectrum-based competition in the marketplace, and better enables the cash flows of the licensees to service the significantly reduced debt. We will re-auction licenses for the 15-megahertz spectrum blocks that are returned under the same designated entity terms as apply to all other C-block licenses. Several of the largest licensees have endorsed this option.

Third, under the prepayment option, licensees may apply 70 percent of their downpayments from licenses they now choose to abandon and 100 percent of their downpayments for licenses they now choose to keep to pay for as many licenses at the original auction price as they can afford. This is a buy-out, not a bail-out. Again, returned spectrum will be re-auctioned under the same terms as apply to all other C-block licenses.

Rejected Options

We carefully considered and discarded other options. For example, our dissenting colleague would have offered vastly more generous buy-out options. His actions suggest that the prospect of a large licensee filing for bankruptcy must be avoided at all costs. I cannot agree.

Substantial Discounts: Under the approach advocated by the Chairman, the debt owed by the licensees would be drastically discounted -- a 40% haircut to the American taxpayer -- well below the prices that other, subsequently disappointed, bidders were clearly willing to pay. This would be replacing a market-based outcome with an FCC-directed outcome. I agree with the Chairman's prior statements that the market -- not the FCC -- should pick the winners and losers.

In my view, the price bid is the price bid. Bidders were not offered a cash versus credit price. The notes do not provide for prepayment discounts. If the FCC wanted to induce licensees to prepay, we would have included a prepayment schedule in our notes and rules. To the contrary, the favorable financing terms offered -- at an interest rate reflecting the cost of capital to the U.S. government -- were designed, in part, to induce designated entities to hold their licenses for a full ten years. This was consistent with Congress's stated goals to bring small business, including women and minorities, into the market -- on a sustained basis. Therefore a licensee would be unjustly enriched if it received the

full ten year benefit of attractive financing without the burden of holding the license for the full term.

Use of All Downpayments: I also disagree with the Chairman that the C-block licensees should be permitted to "spend" 100 percent of their deposits from licenses they no longer want, to pay for licenses they *do* want. These funds have been paid to the U.S. Treasury and are not the licensees' to redeploy as they wish. That policy was clearly stated in our rules and documentation. Indeed, the Chairman reiterated that view in an April 30, 1997, speech to the Federal Communications Bar Association:

> Some say that the C-block licensees will not pay the total of their commitments to installment payments. If that is true, they will not hold the licenses any longer. But still the taxpayers will have received all the installment payments to that date, and we will reauction the licenses. . .

A buyer of an option to purchase a piece of property is not entitled to apply the price of that option to the purchase price of another property. If licensees were able to use 100 percent of their deposits to cherry-pick which licenses they want to keep and which they want to return, they would recoup in full what they paid and there would be no deterrent in future auctions against bidding excessively. Such a result surely would poison a market-based auction.

Moreover, we have repeatedly refused to allow defaulting licensees to recoup their downpayment -- not just in the C-block auction, but in other auctions. Again, the purpose is to ensure the integrity of the auction.

Nonetheless, to accommodate some of the troubled licensees, the majority has agreed to allow them to apply up to 70 percent of the downpayments on licenses returned and 100 percent of the downpayment on licenses kept toward payment for selected licenses. The remaining 30 percent of the downpayment on returned licenses equates to the 3% of bid price default penalty specified in our rules.

The Wireless Telecommunications Bureau has routinely assessed such penalties, including loss of downpayment, on defaulting bidders.[1] It also have assessed similar penalties against defaulting auction winners in other spectrum bands. While the amount at stake for the largest C-block licensees is not insignificant, surely it cannot be the policy of the FCC that we grant generous breaks to the largest bidders while we strictly apply our rules -- including the penalty provisions -- to the smaller bidders.

Transferable Bidding Credit: Finally, the Chairman would have allowed licensees to return all licenses and then apply 100% of their downpayments as a transferable bidding credit in a

[1]For example, in May, one C-block bidder, BDPCS, Inc., was assessed a $67.7 million penalty, which totals 7% of the face amount of its bids of approximately $873 million. See BDPCS, Inc., Order, 12 FCC Rcd 6606 (WTB, 1997). Another C-block bidder, C.H. PCS, was assessed an initial penalty for over $6.4 million. C.H. PCS Inc., Order, 11 FCC Rcd 22430 (WTB, 1996).

subsequent auction. This option, too, was carefully considered and discarded as being grossly unfair to losing C-block bidders, and to those bidders who already have built out their systems and cannot risk returning their licenses. It would have put a "thumb on the scales" in the subsequent auction in favor of the defaulting bidders. Those who bid up the original auction would now be rewarded by receiving full use of their downpayments toward the same licenses, at presumably significantly lower prices with "use it or lose it" dollars, or to cash out through another bidder. No wonder this concept found few policy adherents.

Other Misconceptions

Declining value of the licenses: Clearly, it would be better if C-block licensees did not file for bankruptcy. As a former communications lender, I am painfully aware of the problems and timeframes associated with bankruptcy proceedings. Nonetheless, I do not share the view that the C-block spectrum is a declining value asset, or that if the licenses were tied up in protracted litigation, they would ultimately yield a small fraction of today's worth. Our PCS service rules are extremely flexible, allowing licensees to provide both fixed and mobile services. With changing technology constantly creating new services, there is every likelihood that demand for this spectrum will be there whenever the licenses are reauctioned.

Forestalled Competition: Nor do I believe that C-block licensees must build their systems now or consumers will suffer from lack of competition in mobile communications. Even if buildout of a substantial portion of the C-block licenses were delayed, consumers still have the benefit of competition from the A and B blocks, wide area SMR, and the PCS D, E, and F blocks, in addition to the two cellular licenses in each market. Consumers in many markets already enjoy a substantial reduction in rates as a result of PCS competition.[2] Moreover, licensees are obligated to have built their systems only by the fifth year. Thus even if bankruptcy were avoided, there is no guarantee that service would commence immediately.

I reject the argument that if we do not provide extraordinary relief to the largest C-block licensees, other C-block licensees will be stymied by lack of roaming opportunities for their customers. The marketplace recognizes the problem, and has been working on a solution. Equipment manufacturers are helping to forge agreements that will enable the PCS equipment to roam nationwide, and new handsets operate on both cellular and PCS frequencies. I am confident that wireless telephone competition will not come to a grinding halt if there were a delay in the buildout of some of these licenses.

Conclusion

The FCC's primary responsibilities are to write fair rules, run fair auctions, and issue licenses to successful bidders. We have an obligation of fairness and impartiality to those who bid but

[2]The Yankee Group identifies over 40 markets that now have three wireless competitors and 10 markets with four competitors. It observes that pricing in competitive markets with at least one new PCS operator averages 18% lower than in markets with no PCS competitors. *Yankee Watch Mobile Flash -- Competition Begins to Have an Impact on Wireless Pricing (April 18, 1997).*

chose not to overbid or overleverage. And we owe it to the C-block licensees who seek no special treatment but just want to get about their business to avoid changing the rules in any fundamental way that is detrimental to their business plans.

I believe the approach we adopt today fairly balances the competing interests. Restoring regulatory certainty to the marketplace promotes investment, competition, and service to the American public. Even though the approach we adopt today is the product of negotiation and compromise, and does not reflect the first-choice preferences of any individual Commissioner, I am satisfied that under present circumstances adoption of this order is the course of action that best serves the public interest.

SEPARATE STATEMENT OF

COMMISSIONER RACHELLE B. CHONG

Re: Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services Licensees, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rulemaking*

Introduction

Three years ago, we set up a series of new rules for the conduct of a historic auction, the first U.S. auction of spectrum for the purpose of providing Personal Communications Service (PCS). Our previous assignment methods of lotteries and comparative hearings were time-consuming, resource-intensive, and encouraged losing applicants to tie up the licenses in years of litigation. We believed that auctions would speed the development and deployment of new services to the public; encourage the efficient use of spectrum; and generally award licenses to those parties who value them most highly and who are thus most likely to introduce service rapidly to the public. Finally, auctions recovered for the public a portion of the value of the spectrum.[1] Thus, we firmly believed that the public interest would be served by having market forces, rather than regulators, decide who should be assigned licenses for the PCS spectrum. We also put our trust in market forces to determine which licensees would succeed and which would fail.

Consistent with our statutory mandate under section 309(j),[2] however, we incorporated in our auction rules some special assistance to "designated entities," including small businesses, minorities, women, and rural telephone companies. After some unexpected delay caused by the release of the Supreme Court's *Adarand* decision,[3] this assistance was narrowed to apply only to small businesses. Because the main problem small business faced was access to capital,[4] we gave them a number of regulatory advantages to address this problem and to give them opportunities to succeed. These tools included a smaller down payment, installment payments and their own block (C Block) so they would not have to bid against larger, "deep pocket" companies.

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[1] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Report and Order*, 9 FCC Rcd. 2348, 2349-50 (1994).

[2] 47 U.S.C. § 309(j).

[3] *Adarand v. Pena*, 515 U.S. 200 (1995).

[4] Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Report and Order*, 9 FCC Rcd. 5532 (1994).

Despite these advantages, some C Block licensees have found themselves in financial trouble. These licensees allege that the higher per pop[5] values they paid for their C Block licenses as compared to their counterparts in the A and B Blocks, together with alleged recent downturns in the wireless financial markets, have made it difficult for them to obtain financing. A number of C Block licensees have petitioned this Commission asking for relief. They have made impassioned pleas for very dramatic restructuring of their installment payment plans. Some have gone so far as to claim that if we do not restructure their debt, they will go into bankruptcy, pointing to one large C Block licensee who has already gone into bankruptcy.

Since the beginning of this debate, my initial reaction to these requests for relief was to turn them down. No one disputes that our rules at the time of the auction were clear. Every applicant knew exactly what would happen if a licensee failed to pay in a timely manner. In our rules and in the notes signed by the C block licensees, the Commission could not have been clearer that we granted these licenses subject to conditions. If a licensee failed to meet a condition, including making a timely installment payment, it would be in default; in such an event, the license would be returned to the Commission.[6]

Major Restructuring Requests

Regardless of these clear rules and executed financial agreements, some C Block licensees have asked us for dramatic restructuring, including up to a 70-80% reduction of their debt or deferrals of all payments for a number of years. I believe it would be unwise for the Commission to agree to any such major restructuring. First, I believe that a major restructuring – or any other dramatic after-the-fact rule change designed to bail out every financially-troubled C Block licensee – harms beyond repair the integrity and credibility of our auction rules. Such a major restructuring would make a mockery of our entire auction process.[7] In addition, I believe major restructuring would encourage speculation in any future auctions, because bidders may rely upon anticipated regulatory relief in making bids that are higher than prudence would warrant. Further, any major restructuring might also deter future investment because of the uncertainty caused by our regulatory actions. It is not just the integrity of our auctions rules that is at stake; if we were to permit major

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[5] "Pop" is defined as prices per MHz per population.

[6] I believe that our licensees reasonably should have expected the Commission to deny requests for relief. Even our dissenting colleague, who thinks that the relief we provide C Block licensees does not go far enough, has publicly stated that if defaults occurred, he would not hesitate to take back the licenses. *See* speech by Chairman Reed Hundt, "To Loop or Not to Loop: Is that the Question?" before the Cellular Telecommunications Industry Association (March 26, 1996) ("But I have heard that some bidders believe that the FCC will forgive the down payment due when the auction is over and even may forgive the principal payments which begin six years later. In the event that anyone knows anyone who thinks such thoughts, I have some advice you can pass on to them: Forget about it.")

[7] My dissenting colleague states that we have a "sanctimonious" attitude. Far from passing any moral judgments, my decisionmaking is based on the facts, the law, and notions of sound public policy.

restructuring, we would head down a very slippery slope which could have dire consequences for the agency and all of its rules.

Second, I opposed any major restructuring because I felt that it would be inherently unfair to other bidders and licensees, including the following: (1) losing C Block bidders who made prudent bids in accordance with our rules but were outbid by those now in financial trouble; (2) rule-abiding C Block licensees who are promptly making their payments and building out their systems just the way Congress and the Commission wanted them to; and (3) other broadband and narrowband PCS licenses who are competing with the C Block licensees for financial support in the marketplace. These other bidders and licensees have expressed tremendous frustration and downright anger that the Commission would even consider breaching its duty to the American taxpayers and to our other licensees by changing our rules after the fact to give unwarranted relief to financially troubled C block licensees. These licensees are right – every notion of fair play is violated by a bailout. If we go too far to help the financially troubled C Block licensees, we end up skewing the marketplace and rendering more serious harm to others who played by our rules.

The Menu Approach

It has been my consistent position that the wisest thing for us to have done was to decide quickly to enforce our rules. Having said that, some of my colleagues wished to go much farther. In the spirit of compromise and because I felt strongly that we needed to resolve the C Block question as quickly as possible,[8] I initiated the idea of a menu approach

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[8] My dissenting colleague has characterized the majority of the Commissioners as being unwilling to act, or the cause of a ten month delay in reaching a resolution of the C Block issue. I wish to set the record straight. The first C Block request for relief was filed in March 1997, and the draft Public Notice putting out those requests for comment was not presented to the other Commissioners' offices until late May. Reply comments on the petition were due in July 1997, after which time the Staff drafted an item. Thus, given the pleading cycle, no action could have resulted before August. The notion that the Commissioners in the majority are somehow responsible for a ten month delay is ridiculous. Since August, the three Commissioners and our staffs have been deeply engaged in this issue, meeting with dozens of parties, talking with financial analysts and Congress members, reading dozens of *ex parte* filings, and consulting with bankruptcy counsel and the FCC Task Force. In truth, the only delay in this decision was caused by the Chairman, who, for about eight weeks, was wedded to an approach not favored by a single other Commissioner, and who refused to concede defeat. It was he who erected a number of procedural roadblocks in the way of a more timely item. Notably, when a majority of the Commissioners directed the staff in writing to prepare a draft item disfavored by the Chairman, he directed the staff to disregard our instructions, claiming that under Section 5(a) of the Communications Act, he is the "CEO" of the Commission and as such, is the sole person who may "coordinate and organize the work" of the Commission's staff. While Section 5(a) states that the Chairman may coordinate and organize the work of the Commission, he may do so only "in such a manner as to promote prompt and efficient disposition of all matters within the jurisdiction of the Commission." Clearly, the prompt and efficient disposition of the C block matter was not served by a Chairman who refused to allow the staff to draft a decision supported by a majority of the Commissioners. Having studied the legislative history of Section 5(a), I know that Congress did not intend for Section 5(a) to be a tool of the Chairman to defeat the basic structure of the Commission as a multi- member body, with majority rule and equal votes granted to each Commissioner.

and agreed to compromise on the ultimate menu that we adopt today in order provide some modest and limited relief for troubled C Block licensees.

The Prepayment Option

Although I support the majority decision, I remain concerned that we may have gone too far, particularly with the prepayment option. I would have preferred not to include this option at all, or if so, to allow the parties to use only 50% of their deposits. Again, due to the need to get the proceeding concluded, and because I felt that the 70% figure was consistent with our rules,[9] I ultimately agreed to the majority's proposal. This proposal was, however, as far as I thought we could prudently go, without endangering the integrity and credibility of our rules.

My dissenting colleague makes clear that he would have preferred to allow the licensees to use 100% of the downpayment and to allow a discount on the net bid price to the net present value. I believe his proposal would have been bad public policy for a variety of reasons. First, I believe that it would have been unfair and commercially unreasonable for us to have discounted the face value of the notes to their net present value. It is clearly fair to other bidders and to the integrity and credibility of our rules for the prepayment to be in the amount of the note, *i.e.* to make the licensees pay what they bid. If we offered an arbitrary discount to net present value, then every C Block licensee – even those who can pay what they bid – would demand the same discount. Clearly, the loser would be the American taxpayer, and the culprit the agency that cannot abide by its own rules. Further, to offer deep discounts off the net amount of the debt is outside normal commercial practices. By allowing C Block licensees to pay off their debt in advance of the maturity date, we are allowing them to reap the benefit of not incurring additional interest due on the principal amount owed. To discount the amount of principal owed by C Block licensees would unfairly permit a windfall.

Second, I object to my dissenting colleague's characterization of our decision to allow licensees to use only 70% of their deposits (as opposed to 100%) as an unreasonable imposition of a "penalty." This is no penalty! The prepayment option is simply that – an option. If a licensee wishes to continue to make installment payments under the terms of its agreement with the Commission, it may do so and all of the monies on deposit with the Commission will go to pay for the purchase of those licenses. Allowing parties to take deposits that were targeted for a specific market's license, aggregate those deposits and use them to buy other licenses for other markets is an enormous benefit that our rule abiding C Block licensees can't enjoy. Under our rules, no such aggregation is allowed; those monies on deposit would have been forfeited to the Commission if the installment payments were not made on each license. Thus, allowing a licensee to use any percentage of deposits for any license they return to the Commission is an enormous benefit; allowing licensees to use 70% of those deposits is downright generous.

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[9] *See* 47 CFR Section 1.2104(g)(2).

Nor do I believe that our failure to adopt the Chairman's prepayment plan makes our C Block approach unworkable. As an initial matter, I do not agree that, as my dissenting colleague asserts, the acid test of our decision is how many licensees avail themselves of the options we set forth here today.[10] At the time we put in place our C Block auction rules, I expected there to be winners and losers. There will be some who may not have prudently bid or who are overcome by subsequent market events; I do not believe it to be the Commission's job to bail out every licensee who finds itself in financial trouble. This notion is inherently inconsistent with an auction and market forces process.

Further, I believe that the more modest relief we have adopted herein does provide some reasonable alternatives for financially troubled C Block licensees. I am optimistic that our menu of options will be attractive to a wide range of licensees. Several of the options we presented have been specifically advocated by and supported by commenters.[11] We also have taken steps to make our option attractive to those who have built out their systems.[12] In addition, it appears from recent press reports, that our options may even be attractive to those licensees who are in bankruptcy.[13] A third party has petitioned the bankruptcy court in the *Pocket* bankruptcy matter, seeking to purchase Pocket's assets and resume its installment payments.[14] This development generally confirms the wisdom of my initial position that the best thing to do was to simply enforce the rules, and let the market work. In any event, this development supports the majority's belief that the options we have adopted are sufficiently attractive to encourage parties to invest in even the most troubled of C Block licensees.

Bankruptcy Concerns

It may well be, however, that our menu approach does not appeal to every licensee and that some C Block licensees will reject all the options and go into bankruptcy. This is neither a surprise to me nor a development that causes me any serious alarm. In fact, this is a risk I am willing to take. My dissenting colleague's statements to the contrary notwithstanding, it is not the Commission's job to bail out every C Block licensee. Some

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[10] Indeed, if all parties took an option, it may be evidence that the proposal was too generous.

[11] Clearcomm, L.P., Americall International, L.L.C., and Chase Telecommunications, L.P. *ex parte* letter, September 17, 1997.

[12] Under each of the options, those who have built out have an opportunity to keep the licenses in those markets where they have built out – subject to certain restrictions designed to prevent "cherry picking."

[13] Although, in general, I am loathe to comment on a pending litigation matter, because this matter was reported in the press and my dissenting colleague raises it in his dissent, I feel I may briefly discuss it here. I am, however, deeply disappointed that my colleague, an experienced litigator, would see fit to include in his separate statement the advice of our bankruptcy counsel as to our conduct of pending litigation. Moreover, any implication that our counsel's advice supports only the Chairman's position is simply incorrect.

[14] "National Telecom Makes Unsolicited $1.5 Billion Bid For Pocket," Communications Daily, October 3, 1997.

bidders simply made imprudent business decisions, and despite our desire to assist small businesses in starting wireless businesses, the Commission's C Block auction process only offered *opportunities*, not *guarantees* of success. Our job here is to make sure that the public interest is served. The decision we make today strikes the right balance between our responsibility to preserve the integrity and credibility of our rules and our obligation to be fair to all licensees – including those who are successful and those who find themselves in trouble.

Although I am not indifferent to the sad plight of the financially troubled licensees, or to the delays in service and costs to the Commission associated with a bankruptcy proceeding, I disagree with my dissenting colleague that we should make the threat of bankruptcy the key driver of our decision today. There are three main reasons for my view. First, bankruptcies are a normal activity of our commercial world and, in our role as lender, should be expected. In fact, since, as Commissioner Ness astutely noted, the Commission did not even check applicants' financial status as a traditional lender would have, it truly would have been extraordinary had there been no C Block bankruptcies. The Commission has litigated many a bankruptcy before, and I have full faith in our counsel to obtain the best result possible given our strong case.

Second, despite assertions by my dissenting colleague to the contrary, I do not think the presence of a C Block licensee as the "fifth competitor" in the market is the key to competition in the wireless industry. Even without a C Block licensee in all of the markets, competition in the wireless market will continue to flourish.[15] The combination of four PCS and cellular players, each with more than 25 MHz of spectrum, together with the D, E and F Block licensees, each with 10 MHz, and an enhanced SMR provider makes for a vibrant competitive mix. Nor do I believe that the whole C Block will fail if the largest competitors do not build out their systems immediately. When we declined to adopt a single technology standard for PCS, we left open the possibility that there would be situations where parties would have to roam on PCS blocks other than their own. Although a delay in the roll out of service by a third PCS competitor may make roaming agreements a bit more difficult to negotiate, with the recent advancements of dual mode phones, carriers will soon have four wireless systems on which to roam.

Finally, I disagree with my dissenting colleague's characterization of the C Block as "a wasting asset." If there is one thing that I have learned in my years in the dynamic wireless industry, it is foolish to try and predict the future. Spectrum and services once thought to have little value have often proven to be extremely valuable. For example, C Block spectrum – which some knowledgeable parties thought would sell for significantly less than A and B block spectrum – far outstripped those values. Although time to market is certainly one factor in determine the value of spectrum, I think the value of the C Block licenses in the future will depend on many factors, including developments in technology and the amount and type of other spectrum available for similar uses.

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[15] It is worth noting that our rules do not require PCS licensees to build out their systems in less than 5 years in any case. 47 CFR § 21.930.

Conclusion

In sum, I support the majority's decision today with full confidence that we have made a wise and fair decision. I hope that the regulatory certainty that will flow from our menu approach will finally allow the C Block licensees to get back to the business of building out their systems.[16]

[16] It does seem fitting somehow that this Commission, who cut its first teeth on the PCS auction and service rules back in the summer of 1994, finish its term with yet another major PCS decision.